STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2008
v	No. 277696 Oscoda Circuit Court
DEBRA ANN INSCO, Defendant-Appellant.	LC No. 06-000979-FH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction of delivery of a schedule 3 controlled substance (Vicodin), MCL 333.7401(2)(b), entered after a jury trial. We affirm.

Defendant was charged as a result of an allegation that Kenneth David, a confidential informant working for the Strike Team Investigative Narcotics Group (STING),[1] made a controlled buy of Vicodin pills from defendant on April 26, 2006. David met with STING members Officer Eric McNichol and Sergeant Stephen Nahs for the purpose of making a controlled buy from defendant, whom David had said had prescription drugs for sale. McNichol and Nahs found no contraband on David's person or in his car. The officers gave David a $100 bill and a $50 bill in prerecorded United States currency, and a radio transmitter.

The officers monitored the radio and heard David arrive at a residence and then speak with a female subject. David purchased ten Vicodin tablets from the subject and left the residence. David met the officers at a predetermined location and turned over the Vicodin tablets, $70 in change from the $100 bill, and the $50 bill. McNichol believed that defendant's address was 211 Cass Street. The house had a Century 21 "For Sale" sign in the yard. David told McNichol that no cars were present at defendant's residence at the time he (David) went there to make a purchase.

[1] STING is a multi-jurisdictional task force operated by the Michigan State Police.

Rebecca Ewald, a defense witness, testified that she recalled seeing David at defendant's home, on one or two occasions before the date in question, seeking to purchase prescription medications. Ewald stated that defendant told David that her medications were not for sale.

Damian Darrow, defendant's son and a defense witness, testified that he was driving his mother's car on May 2, 2006, and had an accident. He stated that, before that date, his mother left her car in the driveway during the day, and then moved it to the garage at night. Darrow denied that he was ever present when David purchased pills from defendant.

Defendant's testimony was rambling and nonresponsive; however, she asserted that David had appeared at her home at 120 Cass Street before April 26, 2006, and asked if she had pain medication for sale. Defendant stated that she did not know David and told him that he had the wrong house. Defendant contended that, as of April 26, 2006, David was not welcome at her home and did not appear there on that day. Defendant also stated that the house located at 211 Cass Street was very similar in appearance to her home and was for sale by Century 21, as was her home, on April 26, 2006. Defendant stated that her car was in her driveway on April 26, 2006.

The jury found defendant guilty as charged.

Defendant moved for a new trial on the grounds of newly discovered evidence and juror misconduct.

At a hearing on the motion, Robert Pollack, the real estate broker who listed defendant's home for sale, testified that, on April 26, 2006, he arrived at defendant's home between 5:00 p.m. and 6:00 p.m., to take exterior photographs, and was there for 10 to 20 minutes. Two cars were located in defendant's driveway. Pollack did not see anyone drive up to defendant's home during the time that he was there. Pollack had no contact with defendant or with anyone else who might have been inside the house during the time he was at the location.

Defendant argued that a new trial was warranted based on the new evidence offered by Pollack. Defendant asserted that Pollack was at the location during the time the sale to David allegedly took place and that his description of the scene was different from that given by the police officer witnesses. Defendant noted that Pollack would contradict David's testimony that no cars were in defendant's driveway when he (David) appeared at the home.

The trial court denied the motion for a new trial on this ground. The trial court noted that no evidence established that Pollack was at defendant's home at the time the buy allegedly took place, and it concluded that Pollack's testimony would not aid the jurors.

Defendant also called Patrick Campbell, who served as a juror on the case, as a witness. Campbell noted that, during deliberations, another juror wondered aloud why police officers would lie on the stand, and other jurors doubted that police officers would engage in such action. Campbell admitted that the jurors considered that the officers could have been mistaken in their testimony. Campbell stated that he did not believe the testimony given by David and that he did not think that the prosecution had proven the elements of the charged offense beyond a reasonable doubt. Campbell stated that when the jury took its first vote he voted not guilty, but that he and two other jurors changed their votes after the foreman remarked that the verdict had

to be unanimous.[2] Campbell stated that he felt badly when he changed his vote, but he acknowledged that he did not feel that he was coerced into doing so. He stated that at the time he changed his vote, he did not understand that he could have continued to maintain his stance that defendant was not guilty.

The trial court denied the motion for a new trial on this ground. The trial court found that the exchanges between the jurors were part of the standard jury process of deliberation and that no misconduct occurred.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

First, defendant asserts that she was entitled to a new trial on the basis of juror misconduct and that the trial court therefore abused its discretion by denying her motion for a new trial. We disagree.

"A defendant tried by a jury has the right to a fair and impartial jury." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). During its deliberations, a jury may consider only the evidence presented in open court and may not consider extraneous facts not introduced into evidence. *Id*. As a general rule, jurors may not impeach their verdict by submitting affidavits establishing misconduct in the jury room. *Id*. at 91. Jurors may not challenge mistakes or misconduct inherent in the verdict. *Id*.; *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004).

The alleged misconduct related to "influences internal to the trial proceedings," *Fletcher*, *supra* at 539, rather than to extraneous facts that came to the attention of the jury during its deliberations. Specifically, defendant attacks the jurors' discussions regarding witness credibility, as well as the jurors' understanding, or lack thereof, of the right to maintain a position (i.e., a determination that the defendant is guilty or not guilty), notwithstanding the fact that doing so would prevent a unanimous verdict. Juror Campbell's assertions addressed behavior inherent in the verdict. Such behavior cannot be challenged after the fact. *Budzyn*, *supra* at 91. The trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis.

Defendant next contends that the trial court should have granted a new trial based on newly discovered evidence.

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on

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[2] The jury deliberated for several more hours before Campbell and the other two jurors changed their votes.

retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal citation and quotation marks omitted).]

The evidence that Pollack was outside defendant's home for some period of time between 5:00 p.m. and 6:00 p.m. did not establish that Pollack was there when David was present. Moreover, Pollack's testimony that vehicles were parked in defendant's driveway would essentially be cumulative to testimony given by defendant and defendant's son, and could be used only to impeach David's testimony on this issue. "[N]ewly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes." *People v Stricklin*, 162 Mich App 623, 632; 413 NW2d 457 (1987). Defendant has not shown that Pollack's evidence would make a different result probable on retrial. *Cress*, *supra* at 692. Under the circumstances, the trial court cannot be said to have abused its discretion by denying defendant's motion for a new trial on this ground. *Id*. at 691.

Finally, defendant argues that she is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Determining whether a verdict is against the great weight of the evidence requires a review of the entire body of proofs. The test is whether "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). An objection going to the great weight of the evidence can be raised only by a motion for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988).

No prosecution witnesses, other than David, testified about witnessing the alleged transaction between David and defendant. Defendant correctly points out that some members of the STING team believed that the address to which David went was 211 Cass Street rather than 120 Cass Street; however, another member of the team watched David pull into a driveway and enter a house. That witness confirmed that the address to which David went was 120 Cass Street. This evidence, if believed by the jury, placed David at defendant's home at the relevant time. The person who answered the door at this address introduced herself as "Deb". David's testimony, as well as that given by defendant herself and Rebecca Ewald, indicated that David and defendant had had some contact in the past. It is unclear why defendant would introduce herself to David, but that exchange was, at a minimum, circumstantial evidence that David met with defendant. Furthermore, the jury could choose to disregard both the contradictory testimony regarding the presence of vehicles in defendant's driveway and David's confusion regarding the exact type of pills he thought he purchased, and find that in fact David purchased pills from defendant. The credibility of the witnesses was for the jury to determine. *Lemmon*, *supra* at 642-643. The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski*, *supra* at 28.

The trial court did not abuse its discretion by denying defendant's motion for a new trial, and the verdict was not against the great weight of the evidence.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto